

PD-0108-20 and PD-0109-20

**In the
Court of Criminal Appeals of Texas
At Austin**

FILED
COURT OF CRIMINAL APPEALS
3/8/2022
DEANA WILLIAMSON, CLERK

Appellate No. NO. 09-18-00218-CR and NO. 09-18-00219-CR

In the Court of Appeals for the Ninth District

Bradley Jacobs Shumway, *Appellant*

v.

The State of Texas, *Appellee*

**APPELLANT'S MOTION FOR REHEARING AND
INCORPORATED BRIEF**

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TO THE HONORABLE COURT OF CRIMINAL APPEALS:

I. MOTION

Appellant moves the Court for rehearing, requesting that this Court vacate its judgment and render a new judgment ordering the trial court to enter judgment of acquittal for Mr. Shumway.

II. ISSUE

This Court's retroactive application of its decision to create an exception to the corpus delicti rule for "incapable of outcry" cases denies appellant due process of law in violation of the Fourteenth Amendment to the United States Constitution as recognized in *Rogers v. Tennessee*, 532 U.S. 451 (2001), and *Carmell v. Texas*, 529 U.S. 513 (2000).

III. THE RELEVANT FACTS ARE NOT IN DISPUTE

The relevant facts are not in dispute. This Court acknowledges that "the State did not satisfy the corpus delicti rule in this case." *Shumway v. State*, 2022 Tex. Crim. App LEXIS 22 *20 (TEX. CRIM. APP. Feb. 2, 2022). Put differently, at trial the State failed to sufficiently prove that any criminal act occurred. *Id.* at *21. Despite this, and for the first time in over one-hundred-sixty years, this Court abolishes strict application of the corpus delicti rule in favor of a trustworthiness of confession

standard that permits less or different evidence than the law required at the time of commission of the offense and at the time of trial *to convict* Appellant. *Shumway*, 2022 Tex. Crim. App. LEXIS at *15-*30 (finding that corpus delicti was not satisfied and affirming Appellant’s conviction based on a newly announced trustworthiness of confession exception for “incapable of outcry” cases). The Court’s decision to retroactively apply the newly announced exception in this case changed the legal standard for measuring the sufficiency of evidence to convict Mr. Shumway.

IV. SUPREME COURT LAW—*BOUIE AND ROGERS*

In *Bouie v. Columbia*, 378 U.S. 347, 354 (1964), the United States Supreme Court held that judicial construction of criminal statutes that is “unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue” must not be given retroactive effect. This holding, regarding judicial ex post facto construction of a criminal statute, applies equally to judge-made ex post facto alterations to the common law. In *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001)(citation and quotations omitted, bold added), the Supreme Court states,

[W]e conclude that a **judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect**, only where it is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.

The rationale for this is that “**limitations on ex post facto judicial decision making are inherent in the notion of due process.**” *Rogers*, at 456 (bold added).

V. ARGUMENT

- A. This Court’s decision, to do away with longstanding law regarding corpus delicti, is unexpected and indefensible with reference to the law which had been expressed as recently as 2015.

The Corpus Delicti Rule is far from outdated or obsolete in Texas. At the time of the offense in April of 2016 and the time of trial in May of 2018 and for over one-hundred-sixty years before this Court’s *Shumway* opinion, Texas courts have rigorously required evidence of corpus delicti to support a criminal conviction like the one in this case. *Miller v. State*, 457 S.W.3d 919 (TEX. CRIM. APP. 2015); *Salazar v. State*, 86 S.W.3d 640 (TEX. CRIM. APP. 2002). Texas, in fact, continues to require some evidence of corpus delicti in all criminal cases that do not fall into the “incapable of outcry” exception. *Shumway*, 2022 Tex. Crim. App LEXIS 22 at *28 (recognizing a “discrete” and “limited” exception to requiring evidence of corpus delicti). Given the historical and longstanding application of the corpus delicti rule, its continued force in the overwhelming majority of criminal cases, and the targeted exception for its application, the change made was clearly unexpected and indefensible.

Just one year prior to the conduct at issue in this case, in *Miller*, this Court answered the State’s request to abolish the corpus delicti rule or replace it with a trustworthiness standard by stating,

[W]e are not persuaded that the corpus delicti rule should be abolished or replaced with the trustworthiness standard.

* * *

We believe that the rule continues to serve an important function, and we note that it has been applied in Texas for at least one-hundred-sixty-one years.

Miller, at 926-27 (bold added). Instead of taking the opportunity to do away with the rule or replace it, the *Miller* court reaffirmed the rule despite a specific request to abolish it. The *Miller* Court adopted a variation of the rule that did not wholly abolish the need to prove corpus delicti to sustain a conviction. *Miller* recognized the “closely related crimes” variation—allowing proof of corpus delicti for one of several closely related crimes to serve as sufficient evidence of corpus delicti for conviction of all closely related crimes. *Id.* at 927. Far from finding that the rule was archaic, outdated, or without purpose, this Court reaffirmed the rule’s longstanding application and its continuing importance in the state.

The *Miller* opinion is clear and convincing evidence that this Court’s decision to abolish the corpus delicti rule in favor of a trustworthiness exception in this case is an unforeseeable and unexpected departure from longstanding and

recently affirmed precedent requiring some evidence of corpus delicti to legally support a conviction. **The change in law here is drastic, turning from requiring evidence of corpus delicti to sustain a criminal conviction**, even if only as to one allegation among several that are closely connected, **to requiring *no evidence of corpus delicti at all—zero.***

B. Other states that have replaced the corpus delicti rule with a trustworthiness standard have done so prospectively only, finding that it would violate Due Process for them to apply the law retroactively

Although this Court may abolish its common law corpus delicti rule and replace it with the trustworthiness exception, under *Rogers* it cannot retroactively apply the change to Appellant without violating his U.S. Constitutional right to due process under the Fourteenth Amendment. See *State v. Plastow*, 873 N.W.2d 222 (S.D. 2015); *People v. LaRosa*, 293 P.3d 567 (Colo. 2013); *State v. Mauchley*, 67 P.3d 477 (Utah 2003).

With equal or greater force to the legal reasoning of Colorado’s Supreme Court in *People v. LaRosa*, 293 P.3d 567 (Colo. 2013), South Dakota’s Supreme Court in *State v. Plastow*, 873 N.W.2d 222 (S.D. 2015) and the Supreme Court of Utah in *State v. Mauchley*, 67 P.3d 477 (Utah 2003), the abolition and replacement of the corpus delicti rule with the trustworthiness standard cannot be given retroactive effect as to Mr. Shumway because the judicially-created alteration

violates Due Process, it is unexpected and indefensible by reference to the law that existed prior to the conduct in issue.

In *People v. LaRosa*, the Colorado Supreme Court found that its newly-announced replacement of the corpus delicti rule with a trustworthiness standard in confession-only cases implicated Mr. LaRosa's Due Process right to fair warning. *LaRosa*, 293 P.3d at 579 (citing *Rogers*).

The facts in *LaRosa* are nearly identical to those in Mr. Shumway's case. In *LaRosa*, the defendant had confessed to "his wife, his mother, his pastor, a police dispatcher, and an investigating police officer that he had sexually assaulted his two-and-a-half-year-old daughter." *LaRosa*, 293 P.3d at 569-70. At trial, no evidence was admitted to support the corpus delicti of the alleged assaults: There were no eye-witnesses, his daughter did not remember the event, and the state produced no evidence, medical or otherwise, to corroborate the confessed-to crimes. *Id.* at 571.

After a jury trial in which he was convicted, an appellate court reversed the conviction finding that the State presented no evidence to establish the corpus delicti of the crime. *Id.* The State appealed the appellate court's decision and the Colorado Supreme Court granted certiorari to review the continuing need to require evidence of corpus delicti to corroborate a defendant's confession. *LaRosa*, 293 P.3d at 571 n.3. Ultimately, the Colorado Supreme Court decided to abandon the corpus delicti

rule in favor of the trustworthiness standard. *LaRosa*, 293 P.3d at 571-78. It then turned to application of the newly-announced change in law to Mr. LaRosa.

The *LaRosa* court declined to apply the new rule to Mr. LaRosa’s case, finding that retroactive application of the newly-announced law would violate his federal due process rights. In summarizing its decision, the court stated,

The corpus delicti rule, although widely criticized, is still followed in many state jurisdictions. Indeed, several state courts have reaffirmed it, presumably rejecting similar arguments to those we have found persuasive here. Further, unlike the “year and a day rule” in *Rogers*, we have applied the corpus delicti rule as a substantive principle of Colorado law for over one hundred years. The rule has been regularly invoked to bar convictions, occasionally in cases similar to this one. Thus, we conclude that LaRosa did not have “fair warning” of our decision to abandon the corpus delicti rule in favor of the trustworthiness standard. Because LaRosa did not have fair warning of our decision, we hold that applying the trustworthiness standard here would violate his due process rights.

LaRosa, 293 P.3d at 579 (citations omitted). Since, the high court was constitutionally prohibited from applying the trustworthiness standard retroactively and the evidence was insufficient to establish the corpus delicti, the appellate court’s decision to reverse Mr. LaRosa’s conviction was affirmed. *Id.*

Almost two years later, in a case with materially similar facts to those in this case and *LaRosa*, the Supreme Court of South Dakota decided that its corpus delicti rule should be replaced with the trustworthiness standard. *State v. Plastow*, 873

N.W.2d 222 (S.D. 2015). Like the Colorado Supreme Court, **the South Dakota Supreme Court found that retroactive application of its newly-announced rule would violate Mr. Plastow’s federal due process right to “fair warning.”** *Id.* at 231 (bold added). The *Plastow* Court found that the corpus delicti rule had been **consistently applied** in South Dakota since 1975. *Id.* at 230.

Additionally, the *Plastow* court likened the substantive effect of its abolition of the corpus delicti rule in favor of the trustworthiness standard to the substantive effect of the legislative change regarding corroborative evidence prohibited by the Ex Post Facto Clause in *Carmell v. Texas*, 529 U.S. 513 (2000). *Id.* at 231. As the *Plastow* court found,

Carmel held that **reducing the quantum of corroborating evidence required in a criminal case violated a “fundamental fairness interest**, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.”

Id. (quoting *Carmel*, bold added). As in *Carmel*, therefore, **the *Plastow* court reasoned that its replacement of the corpus delicti rule with a trustworthiness standard implicated fundamental fairness and the right to fair warning protected by the Due Process Clause:** It was prohibited, therefore, from applying the change retroactively. *Id.*

LaRosa and *Plastow* follow the legal reasoning of Utah's Supreme Court from almost a decade earlier. In *State v. Mauchley*, 67 P.3d 477, 488 (Utah 2003), the Utah Supreme Court abandoned the corpus delicti rule in favor of the trustworthiness standard. The *Mauchley* court concluded that the change in law made by adopting the trustworthiness standard in place of the corpus delicti rule

altered the sufficiency of evidence that was required to convict under the corpus delicti rule because [the trustworthiness standard] requires less or different evidence than the corpus delicti rule required.

Id. at 493 (bold added). The court of appeals's decision to reverse Mr. Mauchley's conviction was therefore affirmed. *Id.* at 494.

All states that have abolished their common law corpus delicti rule in favor of a trustworthiness of confession standard, apply the change prospectively only. In light of their long-standing application of the corpus delicti rule, they have found that the decision to abandon the rule in favor of the trustworthiness standard was unexpected and indefensible. The states have not, therefore, applied the law retroactively to the defendants before them. *Plastow*, 873 N.W.2d at 231; *LaRosa*, 293 P.3d at 579; *Mauchley*, 67 P.3d at 493. Applying the change retroactively, they concluded, would be a violation of the fair warning and due process the United States Constitution guarantees. *Plastow*, 873 N.W.2d at 231; *LaRosa*, 293 P.3d at 579; *Mauchley*, 67 P.3d at 493-94.

C. Retroactive application of the Court’s decision to change the application of the Corpus Delicti Rule materially affects the sufficiency of the evidence needed to convict Appellant and consequently violates Due Process.

The Court is well aware that judicially-created changes to the common law implicate its citizen’s federal due process rights. *Miller*, 457 S.W.3d at 927 (“The next question we must answer is whether application of the exception [to the traditional application of the corpus delicti rule] would violate [Appellant’s] right to due process of law.”). Having changed the law, therefore, this Court must consider the implications of that change for Appellant.

This Court’s decision to abandon the corpus delicti rule and replace it with the trustworthiness standard in “incapable of outcry” situations cannot be retroactively applied to Mr. Shumway because doing so would violate his federally protected right to Due Process. U.S. Const. amend. XIV. Mr. Shumway did not have “fair warning” that the Court would change the law to require less evidence to support conviction than was required at the time of the offense or the time of his trial.

In 2015, approximately one year before the events in this case, this Court reaffirmed the continuing applicability of the corpus delicti rule in Texas; this Court declined to replace it with a trustworthiness standard as proposed by the State; and this Court recognized a “variation” of the corpus delicti rule continuing to require

evidence of corpus delicti. *Miller v. State*, 457 S.W.3d 919 (Tex. Crim. App. 2015). In *Miller*, also an “incapable of outcry” case, this Court found that the corpus delicti rule has been applied in Texas for over 161 years, that it should not be replaced with the trustworthiness standard, and that it continues to “serve an important function.” *Id.* at 926-27.

The longstanding nature of the corpus delicti rule, its consistent and recent application in Texas, see *Shumway*, 2022 Tex. Crim. App LEXIS 22 at *15-*20 (citing application of the rule in cases spanning over a century and as recently as 2021), and the undisputed complete lack of corpus delicti evidence in this case, require that this Court apply the change prospectively only. As in *Plastow*, *LaRosa*, and *Mauchley*, retroactive application of the new rule in a state that has long applied the corpus delicti rule violates the due process guaranteed by the United States Constitution.

This Court should reverse Mr. Shumway’s conviction, finding that the trustworthiness standard in the “incapable of outcry” situation applies prospectively only. This Court thoroughly reviewed the evidence the State proffered to establish corpus delicti and concluded that “under a strict application of the rule, **the State did not satisfy the *corpus delicti* rule in this case.**” *Shumway*, 2022 Tex. Crim. App LEXIS 22 at *15-*20 (bold added). At the time of his trial, therefore, Mr. Shumway was legally entitled to judgment of acquittal. The only legal basis for his conviction

today is the unconstitutional application of a new rule of law, contrary to over a century-and-a-half of legal precedent, that permits less or different evidence than was required at the time of the offense or his trial to support the conviction.

VI. PRAYER

Appellant, Mr. Shumway, prays that the Court grant his Motion for Rehearing, and that upon reconsideration and argument herein, the Court vacate its judgment and render new judgment, ordering the trial court to enter judgment of acquittal.

Respectfully submitted,

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VII. CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of this Motion on the 7th day of March 2022, was electronically served by efile service on the following:

Via Efile service to The Montgomery County District Attorney's Office, Bill Delmore.

Via Efile service to Ms. Stacey M. Soule, State's Prosecuting Attorney.

/s/ Richard Martin P. Canlas

Richard Martin P. Canlas

Attorney for Appellant

VIII. CERTIFICATE OF COMPLIANCE WITH RULE 9.4

I hereby certify that this document complies with the requirements of Rule 9.4(i)(2)(B) of the Texas Rules of Appellate Procedure because there are 3,240 words in this document, excluding those portions of the document excepted from the word count rule under Rule 9.4(i)(1), as calculated by the word processing program used to prepare it.

/s/ Richard Martin P. Canlas

Richard Martin P. Canlas

Attorney for Appellant

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